FO BOON JOAN & ORS

v.

LIM KEW SENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S2(S3)-23-69-1993]
13 SEPTEMBER 2007

UNINCORPORATED ASSOCIATIONS: *Societies - Members' right to sue - Locus standi - Whether members may commence action against society for benefit and interest of themselves and other members - Wrongdoing alleged to have been committed against society - Members' rights to sue governed by rule in Foss v. Harbottle - Whether action should be commenced in society's name - Whether majority of members have consented to the action*

UNINCORPORATED ASSOCIATIONS: *Societies - Internal management - Exchange of land belonging to society - Allegation of breach of trust, breach of fiduciary duties and fraud by office bearers - Transaction approved in Annual General Meeting - Whether allegation proven*

The plaintiffs were members of 'Persatuan Kheng Chew' (the society) and the defendants were the office bearers. The society, intending to build a temple, applied and was alienated with a piece of land known as HS(D) 10427 Lot 3 Mukim dan Bandar Kuala Lumpur (the 10427 land). However, later it was found that the land was not suitable for the construction of the temple. The society then decided to exchange the 10427 land with part of a land known as Mukim Grant no. 67 Lot 42 Mukim Kuala Lumpur (Lot 42) belonging to Kien Huat Realty Sdn Bhd (Kien Huat). It was agreed that Lot 42 would be subdivided so that a separate title would be issued for the part of the land to be used for the temple. The agreement for the exchange of land was documented by a deed of gift. Kien Huat then offered to the society the remaining part of Lot 42 for an additional amount of RM400,000. Since the society could not raise that amount of money, it requested the assistance of Grand Ocean Development Berhad (a public listed company where most of its shareholders were also members of the society) and the defendants were the directors. Subsequently, Lot 42 was subdivided into two separate titles: GM 1518 (1518 land) and GM 1519 (1519 land). The 1518 land was used to build the temple and the 1519 land was transferred to Grand Ocean. The members of the society had resolved in their Annual General Meetings that the 10427 land be transferred in accordance with the Deed of Gift.

A The plaintiffs filed this action against the defendants claiming that the defendants had unlawfully transferred out the land of the society without the consent of the society and/or majority of its members and that in doing so, they had committed breach of trust, breach of fiduciary duties and defrauded the society. The claim centred mainly on three issues,
B namely: (a) whether the plaintiffs had the locus standi to commence the action against the defendants; (b) whether the 1519 land was the property of the society; and (c) whether the plaintiffs had proven their case against the defendants.

Held (dismissing the plaintiffs' claim with costs):

C

(1) The plaintiffs did not have the *locus standi* to commence this action against the defendants for the benefit and interest of themselves and other members of the society. As members of a society, the rights of the plaintiffs to sue is governed by the rule in *Foss v. Harbottle*
D [1843] 2 Hare 461, 67 ER 189. (para 21)

(2) The wrongdoing was alleged to have been committed against the society or against the majority of its members. Following the rule in *Foss v. Harbottle,* the action in this case should have been made/ commenced in the name of the society. That had not been done.
E Neither was it commenced in the name of the majority of the members of the society. There was no evidence that the plaintiffs had the consent of the majority of the members of the society to commence this action on their behalf. (para 23)

F **(3)** The 1519 land had never become the property of the society. Grand Ocean was to acquire the ownership and benefit derived from the remaining part of Lot 42. There was no evidence whatsoever that the society had made any payment to legitimize its claim over the 1519 land. (paras 27 & 30)

G **(4)** The plaintiffs had failed to discharge its burden of proof. The defendants had on two different occasions disclosed the dealings to the society during its Annual General Meetings in 1985 and 1990. Therefore, no fraud or breach of fiduciary duties had ever been committed by the defendants. (paras 33 & 34)

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Case(s) referred to:
Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(foll)***
Edwards v. Halliwell [1950] 1 All ER 1064 ***(foll)***
Foss v. Harbottle [1843] 2 Hare 461 ***(foll)***
Macdougall v. Gardiner [1875] 1 Ch D 13 ***(foll)***

I

Legislation referred to:
Societies Regulations 1966, r. 13

For the plaintiffs - CW Chan; M/s Syarikat Chan Chow Wang
For the defendants - Gan Khong Aik (Amir Nordin with him); M/s Tee Tai Tzian & Sim; M/s Khairuddin Ngiam & Tan

Reported by Amutha Suppayah

JUDGMENT

Azmel Maamor J:

[1] In this case the plaintiffs' claim against the defendants are for breach of trust, breach of fiduciary duty and fraud.

[2] The brief facts are as follows. The plaintiffs are members of 'Persatuan Kheng Chew' ('the society'). At the material time the 1st and 2nd defendants were trustees for the society. The 3rd and 4th defendants were the vice president of the society. The 5th defendant was the treasurer of the society whilst the 6th defendant was the assistant treasurer. The 7th defendant was the secretary of the society, the 8th defendant was the assistant education officer whilst the 9th defendant was the Social Relations Officer of the society. The 10th to the 14th defendants were the members of the executive committee of the society.

[3] The society intended to build a temple. In order to achieve this purpose, the society applied and was alienated with a piece of land known as HS(D) 10427 Lot 3 Mukim dan Bandar Kuala Lumpur (the 10427 land) comprising an area of 33,079 sq. ft. However, during the commencement of the construction of the temple, the society faced certain difficulties, namely:

(a) it was difficult to carry out works because of the gradient of the 10427 land;

(b) access to the site was only from the main road where the traffic was heavy;

(c) the piling for the foundation caused some earth movements and there were concerns for the safety of the neighbouring houses; and

(d) Tan Sri Lim Goh Tong (Tan Sri), the owner of a neighbouring land requested the society to reconsider the building of the temple on the 10427 land as it would affect the security of his house.

[4] Tan Sri's land is situated at Lot 50 section 94A. He offered to exchange 2.08 acres of land known as Mukim Grant no. 67 Lot 42 Mukim Kuala Lumpur (Lot 42) with the 10427 land. The total area of

A Lot 42 was 4.8 acres. It was registered in the name of Kien Huat Realty Sdn. Bhd. (Kien Huat) of which Tan Sri is a shareholder and director.

[5] Tan Sri wanted the exchange to be done in a certain manner. Lot 42 was to be subdivided so that a separate title would be issued for the part of the land to be used for the temple. On 1 July 1979, the executive committee of the society (the members of the executive committee at the material time) had authorized the 2nd defendant and Tan Koon Swan (DW1) to discuss the matter with Tan Sri.

C **[6]** The society, through the 2nd defendant and Tan Koon Swan, agreed to exchange the land based on the following reasons:

(a) the members of the society were impatient to have the temple;

(b) the area of Lot 42 to be given by Tan Sri upon which the temple was to be built was greater than the 10427 land;

(c) Lot 42 is a freehold land whereas 10427 land is leasehold; and

(d) Lot 42 is away from the main road, with easy access and much easier to construct the temple.

[7] The agreement for the exchange of land was documented by a deed of gift dated 6 December 1979 executed by Kien Huat and the society. The land had to be converted and sub-divided. Accordingly Kien Huat applied for conversion of land use and sub-division of Lot 42. The application was approved and RM503,138 was to be paid as additional premium for the sub-division and conversion of land use of Lot 42. A drainage fee of RM24,600 was also to be paid to the authorities.

[8] The society was to have only 2.8 acres of Lot 42. In addition the society had to bear the cost of conversion and the drainage fee. Kien Huat suggested to the society that if they wanted the remaining part of Lot 42 they would have to pay an additional amount of RM400,000 in the form of a donation to Yayasan Lim (a charitable foundation set up by Tan Sri) thus making a total payment of RM927,198 for the society to get the whole of Lot 42.

[9] But the society could not, at that relevant time, raise that amount of money. The money that the society had then was only sufficient for the cost of constructing the temple. In order to effect the purchase, the society requested the assistance of Grand Ocean Development Berhad (a public listed company where most of its shareholders were also

members of the society) and the defendants were the directors. Two further agreements namely the supplementary deed dated 8 June 1981 between Kien Huat and the society; and a joint venture agreement dated 26 June 1981 between the society and Grand Ocean were signed to effect the transaction.

[10] Subsequently, Lot 42 was subdivided into two separate titles:

(a) GM 1518 Lot 97 section 94B Mukim Kuala Lumpur (1518 land);

(b) GM 1519 Lot 98 section 94B Mukim Kuala Lumpur (1519 land).

[11] The 1518 land was registered in the name of Tan Koon Swan, Loong Lit Hong, the 1st and 2nd defendants. The use of the land is for building the temple.

[12] The 1519 land was initially registered in the name of Tan Koon Swan, Loong Lit Hong, the 1st and 2nd defendants and was later transferred to Grand Ocean (where the use of land is for construction of condominium) pursuant to the aforesaid agreements.

[13] On 22 December 1985, the members of the society had resolved in an annual general meeting that the 10427 land be transferred to Tan Sri in accordance with the agreement made between him and the executive committee of the society in accordance with cl. 5 of the deed of gift dated 6 December 1979, which reads:

> 5. The Donee shall immediately upon the approval of the conversion of the red area execute or cause to be executed a valid and registrable document of surrender of the site of the temple to the relevant authority.

The society had also written to the Jawatankuasa Eksekutif Tanah Wilayah Kuala Lumpur requesting them to effect the transfer of the land to Kien Huat.

[14] Subsequently in the annual general meeting of the society for 1990, the issue of transfer of land between the society and Tan Sri was discussed. In that meeting, after intense debate, it was resolved as follows:

> The meeting was satisfied with the explanation given on the Tian Hou Kong Temple land issue and was of the view that it was not necessary to pursue the matter in an Extraordinary General Meeting.

[15] The 1st plaintiff lodged a police report against the trustee of the society regarding the exchange of land by way of a letter dated 26 June 1991. The transfer according to the plaintiffs was not valid because r. 13 of the Societies Regulations 1966 states:

A The properties of the Association shall not be sold to meet the expenditure of the Association. Properties shall only be sold if a resolution has been passed by three quarter majority of the members present at a General Meeting.

The plaintiffs alleged that this Rule was not abided by the defendants.

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[16] On 17 January 1992 the 10247 land was transferred to Kien Huat. The Society then completed the construction of the temple on the 1518 land.

[17] It was on the basis of such backdrop that the plaintiffs filed this C action against the defendants. The crux of the plaintiffs' case against the defendants is that they had unlawfully transferred out the land of the society without the consent of the society and/or majority of its members and that in doing so, they had committed breach of trust, breach of fiduciary duties (failure to exercise due care, skill and diligence for the D benefit of the members of the society) and defrauded the society. Therefore the plaintiff's claimed for damages for loss and the invalid transfer of the 1519 land.

[18] The disputes between the plaintiffs and the defendants centred E mainly on three issues, namely:

(a) whether the plaintiffs have the *locus standi* to commence this action against the defendants for the benefit and interest of themselves and the other members of the society except the defendants

F (b) whether the 1519 land is the property of the society; and

(c) whether the plaintiffs have proven their case against the defendants in law.

[19] At the hearing three witnesses were called for the plaintiffs, G namely:

(a) Ismail bin Mokhtar, the Head Assistant Director of the Development Unit at the Land Office (PW1);

(b) Tuan Deh Toon (PW2); and

H

(c) Teo Eng Siong, the Secretary of Kien Huat Realty Sdn. Bhd. (PW3).

[20] The defendants on the other hand called six witnesses, namely:

I (a) Tan Koon Swan, former trustee of the society (DW1);

(b) Lee Yong Chee @ Lee Ah Fong, a Commissioner for Oaths (DW2);

(c) Tan Loon Swan (DW3);

(d) Loong Suet Yeng who was in charge of book-keeping for Wing Construction (M) Sdn. Bhd. (DW4);

(e) DSP Chew Tham Soon, Head of the Management Division of IPD Kota Kinabalu, Sabah (DW5); and

(f) Foo Seong Foo (DW6).

[21] As regards to the first issue, based on the circumstances of this case, it is my finding that the plaintiffs do not have the *locus standi* to commence this action against the defendants for the benefit and interest of themselves and other members of the society. As members of a society, the rights of the plaintiffs to sue is governed by the rule in *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189 which was followed by the Court of Appeal in *Edwards v. Halliwell* [1950] 1 All ER 1064. The Court of Appeal stated:

> The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quoestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual members can assert in his own right.

[22] Similar principle was applied by the English Court of Appeal in *Macdougall v. Gardiner* [1875] 1 Ch D 13 as follows:

> it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in ... *Foss v. Harbottle* should always be adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the

A subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent - unless there is something *ultra vires* on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it ... and it is
B the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject matter of litigation, or whether it will take steps itself to prevent the wrong from being done ...

C **[23]** In applying the above principles, it is clear from the facts of the case that the wrongdoing was alleged to have been committed against the society or against the majority of its members. Following the rule in *Foss v. Harbottle*, the action in this case must be made/commenced in the name of the society. That had not been done. Neither was it commenced in the name of the majority of the members of the society.
D There was no evidence that the plaintiffs had the consent of the majority of the members of the society to commence this action on their behalf. This fact had been admitted by the 4th plaintiff when he stated in evidence that he did not have any consent from the society to commence the action. Therefore, following the rule in *Foss v. Harbottle*, it is clear
E that it was for the society to decide whether any action is to be taken or not against the defendants and not for the plaintiffs to decide.

[24] The fact that there were two occasions (in para. 13 and 14 above) where the society authorized and approved the exchange of the society land with that of Tan Sri's, only shows that there was nothing wrong
F with the transfer of land that had occurred. The transfer was valid and the alleged wrongdoing was without basis.

[25] For the reasons as mentioned above, it is my finding that the plaintiffs have no *locus standi* to bring this action against the defendants.

G **[26]** As regard the second issue, I must first of all carefully evaluate the facts of the case. The 1519 land is part of Lot 42 originally owned by Kien Huat. Based on the exchange between Tan Sri and the society it had since been subdivided. The other part of Lot 42 which is the 1518 land was used to build the Thean Hou Temple as the exchange
H of the 10427 land.

[27] Based on the evidence before me the 1519 land had never become the property of the society. All the time it was the property of Kien Huat. What had actually transpired at the exchange was that the 10427
I land was to be exchanged with the 1518 land, which is part of Lot 42. But the society had to pay the conversion costs and drainage fee which the society was unable to raise. Hence to enable the exchange

transaction to proceed the solution was reached that a 3rd party, Grand Ocean Development Bhd would come in to assist by absorbing the conversion cost and drainage fee and purchase the remaining portion of Lot 42 by making the donation to Yayasan Lim in the sum of RM400,000. Only after such involvement of the 3rd party could the exchange of land take place. Without the assistance of Grand Ocean Development Bhd, the 1519 land could never have been transferred to and owned by the society.

[28] The mechanics of the exchange were as follows. The executive committee of the society had authorized the 2nd defendant and Tan Koon Swan to deal/discuss with Tan Sri on the issue of exchange of land. It was agreed that Tan Sri would exchange 2.08 acres of Lot 42, owned by Kien Huat with the 10427 land. To materialize the exchange, parties had executed a deed of gift dated 6 December 1979 as an agreement to exchange the land. The intention of the parties was clearly set out in two documents namely:

(a) the letter from the society to the Jawatankuasa Eksekutif Tanah Wilayah Kuala Lumpur (bundle D p. 29) which states at para. 5:

> Kini kami bertanggungjawab dan berobligasi untuk menukarmilik tanah berkenaan kepada Tan Sri Lim, dengan menurut fasal (5) dibawah Surat Perjanjian Pemberian yang telah disempurnakan oleh kedua-dua pihak pada 6/12/1979 itu ...; and

(b) the letter from Tan Sri to the Society dated 28 June 1985 (bundle E p. 5) which states at para. 3:

> As I have done my part in providing you with an acceptable alternative piece of land which will benefit your Association as your original temple site was too near the main road and too close to heavy traffic, I now request you to transfer your original temple land back to us as agree. My Personal Assistant has spoken to Mr. Tan Koon Swan's office as he has indicated that this would be done.

[29] The need to have the Supplementary Deed was because of the need to pay the premium levied by the authority which Kien Huat did not want to bear. Kien Huat had also offered the society to acquire the remaining part of Lot 42. Since the society did not have the required financial means, Grand Ocean Development Bhd (a company in which most of the shareholders and directors were members of the society) agreed to acquire the remaining part of Lot 42, an act to ensure that the exchange of land could take place.

[30] In order to minimize payment of tax for the transaction, it was agreed by both parties that a supplementary deed and a joint venture agreement (as mentioned above in para. 9) be signed by the parties thereto. Clause 8 of the joint venture agreement states:

> The Owner (the society) shall execute a registrable Memorandum of Transfer of all the document of titles pertaining to the Developers (Grand Ocean) lots in favour of the Developers and/or their nominees free of encumbrances, charges and liens and with vacant possession as soon as the building plans have been approved by the appropriate authority, and the said memorandum of Transfer shall be deposited with the said solicitor of safe keeping.

This clearly shows that Grand Ocean was to acquire the ownership and benefit derived from the remaining part of Lot 42. The donation of RM400,000 to Yayasan Lim as required was handed to Kien Huat on the same day when the supplementary deed was signed. In the light of the arrangement as mentioned above there was no evidence whatsoever that the society had made any such payment to legitimize its claim over the remaining portion of Lot 42 (the 1519 land). In so far as the society was concerned the exchange between the 10427 land and the 1518 land was free of any payments whatsoever.

[31] Prior to subdivision, Kien Huat could not transfer the 2 parts of Lot 42 to 2 different parties. Lot 42 was originally transferred to the society on the basis of the above understanding and upon it being subdivided, the society transferred the other part of Lot 42 (the 1519 land) to Grand Ocean Development Bhd. who had borne all the payments thereof. This is why the 1519 land was initially registered in the name of the trustees of the society, only as a mechanism to effect the transfer of the land.

[32] Therefore, from the facts of the case, having regard to the size and value of the lands involved, it can be concluded that Tan Sri only intended to exchange part of Lot 42 with the society for the 10427 land and intended that monetary payment be made by the society in order to acquire the remaining part of Lot 42. It was Grand Ocean who assisted by coming up with all the monetary requirement and not the society. Thus the 1519 land could not have been given by Tan Sri to the society as part of the exchange. Based on the above, I arrived at the conclusion that the 1519 land was not the property of the society. There is no issue of any alleged wrongdoing by the defendants in transferring the 10427 land. Grand Ocean was in fact doing the society a big favour in coming up with the financial assistance without which the exchange transaction could not have taken place.

[33] As regard to the third issue, it is my finding that the plaintiffs had failed to discharge its burden of proof. In the case of *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 the Federal Court ruled:

> ... where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely.

[34] From the facts of the case, it is clear that the defendants had on two different occasions disclosed the dealings with Tan Sri to the society during its Annual General Meetings in 1985 and 1990 as stated above. Therefore, no fraud or breach of fiduciary duties had ever been committed by the defendants. The plaintiffs also failed to proved that the 1519 land was given to the society free of charge. Also, based on the police report lodged, it was decided that no further action was to be taken. I therefore ruled that the plaintiffs have not discharged its burden of proof. Even if the burden is on a balance of probabilities the plaintiffs had also failed to prove it.

[35] In the circumstances and for the reasons that I have stated above, I dismissed the plaintiffs' claim with costs.